No. 99-1641

IN THE

Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,

v.

MFS INTELENET, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WORLDCOM Communications, Inc. (formerly MFS Intelenet, Inc.) states as follows:

MCI WORLDCOM Communications, Inc., is a wholly owned subsidiary of MCI WORLDCOM Network Services, Inc., which is a wholly owned subsidiary of MCI Communications Corporation which, in turn, is a wholly owned subsidiary of WorldCom, Inc. WorldCom, Inc., through its wholly owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally.

WorldCom, Inc is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns 10 percent or more of WorldCom stock.

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BRIEF IN OPPOSITION

Respondent MCI WORLDCOM Communications, Inc. (formerly known as MFS Intelenet, Inc. ("MFS")),[1] submits this brief in opposition to the petition for a writ of certiorari filed by U S West Communications, Inc. ("U S West").

The petition should be denied for three reasons. First, this case would be an exceptionally poor vehicle for addressing the

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[1] MCI WORLDCOM Communications, Inc. is the successor-in-interest to MFS Intelenet, Inc. To be consistent with the terms used in the Ninth Circuit decision, however, we will continue to use the name "MFS".

issue U S West seeks to raise. The substantive provisions of § 251 of the Telecommunications Act of 1996 (the "1996 Act" or the "Act"),[2] and the implementing regulations of the Federal Communications Commission ("FCC" or "Commission") apply only to provisions imposed by state utility commissions after arbitration. They do not apply to privately negotiated provisions. The provision at issue in this case was negotiated, and thus not governed by the regulations that U S West claims the Ninth Circuit impermissibly passed upon. Thus, this case does not present the question U S West has raised in its petition. At a minimum, this Court could not reach the question U S West presents until it first resolved the entirely fact-bound question whether the provisions at issue here were imposed by arbitration or privately negotiated. That is reason enough to deny the petition.

Second, the Circuit split alleged by U S West is entirely contrived. The Fourth Circuit's decision in *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999), involved an arbitrated rate provision, the lawfulness of which was governed by binding FCC regulations. In rejecting GTE's challenge to the rates, the Fourth Circuit declined to review the substance of those regulations, citing the Ninth Circuit's opinion *in this very case* for the proposition that the Hobbs Act bars a "collateral[] attack [on] the FCC's [orders]," when a binding regulation is in effect. *See* Pet. App. 17a. Thus, the Fourth and Ninth Circuits are in complete accord on the proper application of the Hobbs Act – in those circumstances where the Hobbs Act is relevant.

Third, even if the challenged provision had been arbitrated, review would not be warranted. Because of the unique procedural posture of this case this issue is unlikely to arise

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[2]Pub. L. No. 104-104, 110 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*).

again. More fundamentally, the actions of the Ninth Circuit in this unusual circumstance do not violate the Hobbs Act. The Ninth Circuit did not purport to pass upon the validity of the FCC rules that are presently before the Eighth Circuit in a Hobbs Act case. Thus, the decision in no way usurps the Eighth Circuit's authority. Instead, because the FCC rules at issue were not in effect at the time the Ninth Circuit ruled, the court simply determined whether the agreement met "the requirements of section 251" and section 252 of the Act itself. 47 U.S.C. § 252(e)(6). Nothing in that decision implicates the Hobbs Act, which does not prohibit other Circuits from interpreting and applying the Act itself.

STATEMENT OF THE CASE

A. The 1996 Act

1. The Act's Leasing Provisions and the FCC's Combinations Rules

Congress enacted the 1996 Act to end the "longstanding regime of state-sanctioned monopolies" that has prevailed in markets for local telephone service across the country for almost a century, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) ("*AT&T* "), and to replace it with a vibrant competitive market that will bring lower prices and better service to consumers "as quickly as possible." H.R. Rep. No. 104-204, at 89 (1995) ("H. Rep."). Because local telephone markets were traditionally controlled by incumbent monopolists like U S West – which own nearly all of the facilities necessary to provide local phone service – the Act imposes a number of duties upon incumbent carriers to ensure the advent of competition in the local telephone market. As this Court recognized, "[f]oremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) . . . to share its network

with competitors." *AT&T*, 525 U.S. at 371. The Act thus authorizes new entrants such as MFS to provide local telecommunications service using leased elements of an incumbent carrier's existing network. *See* 47 U.S.C. § 251(c)(3).[3]

To facilitate entry of new competitors into the local market, § 251(c)(3) of the Act requires an incumbent carrier to provide access to its network elements "in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service." *Id.* Pursuant to its statutory obligation to implement the terms of the 1996 Act, the FCC concluded that this language requires incumbent carriers to provide unbundled network elements in combined form. *See* 47 C.F.R. § 51.315; *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, ¶¶ 293-297 (1996) ("Local Competition Order"). FCC Rule 315(b) thus mandates that incumbent carriers lease combinations of unbundled elements that exist in the incumbent's network, and subsections (c) through (f) of the Rule require incumbents to combine previously separate elements for a requesting new entrant, and to combine the incumbent's elements with those of the new entrant.

Upon its release in August 1996, the Local Competition Order was subject to numerous Hobbs Act challenges. These challenges were consolidated for review in the Eighth Circuit,

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[3]In addition to the leasing provisions, the Act establishes two other routes for new entrants to enter local markets. First, a new entrant can "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). Second, a competing local carrier can purchase an incumbent's local telephone services at wholesale rates, under the Act's "resale" provisions. *See* 47 U.S.C. § 251(c)(4); § 252(d)(3).

which invalidated Rules 315(b)-(f). *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *rev'd in part and aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Eighth Circuit concluded that the language in § 251(c)(3) stating that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service," 47 U.S.C. § 251(c)(3), "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Iowa Utils. Bd.*, 120 F.3d at 813. Thus, the Eighth Circuit concluded, "unbundled" can only mean physically separated. *Id.*

This Court reversed the Eighth Circuit on that point, explicitly rejecting the Eighth Circuit's conclusion that § 251(c)(3) allows the leasing only of "discrete pieces" of network elements. *AT&T*, 525 U.S. at 393-95. The Court rejected the incumbents' argument that "unbundled" as used in § 251(c)(3) means physically separated into pieces, emphasizing that § 251(c)(3) "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *AT&T*, 525 U.S. at 394. Because nothing in the Act itself precludes a requirement that incumbents lease network elements in combined form, and because the FCC's justification for imposing the combinations rule was reasonable, the Court upheld the FCC's requirement that incumbents provide access to existing combinations of network elements. *Id.* at 395.[4]

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[4]This Court also affirmed the FCC's "all elements" rule, which allows new entrants to provide a finished service via unbundled network elements. In doing so, this Court rejected the incumbents' argument that permitting new entrants to provide telecommunications services using combinations of network elements "eviscerates the distinction between resale and unbundled access" and "amounts to Government-sanctioned regulatory arbitrage." *AT&T*, 525 U.S. at 393-94.

Although it rejected the basis upon which the Eighth Circuit invalidated the FCC's combinations rules, this Court did not expressly rule on the validity of Rules 315(c)-(f). The Eighth Circuit is currently considering whether it should reinstate the remainder of Rule 315 in light of the Supreme Court's decision. *See* Pet. App. 114a.

2. Negotiation and Arbitration Under the Act

The Act establishes two different ways in which a new entrant and an incumbent carrier can reach an "interconnection agreement" – a contract that sets forth the terms and conditions under which the new entrant will have access to the incumbent's network.[5] The first is negotiation: under § 252(a)(1), a new entrant may request that the incumbent carrier engage in negotiations to determine the terms and conditions by which the new entrant will lease network elements. 47 U.S.C. § 252(a)(1). The only constraints on negotiated terms are: 1) the term must not discriminate against a carrier not party to the agreement, and 2) the term must be consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(a)(1); § 252(e)(2); *AT&T*, 525 U.S. at 372-73 (noting that an incumbent may "negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or (c)") (footnote omitted).

The second method is through arbitration. After a fixed period of time, if the parties fail to agree on some or all of the terms and conditions of interconnection, they may submit the unresolved issues to a state utility commission for compulsory arbitration. 47 U.S.C. § 252(b)(1). Any arbitrated term must be

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[5]These procedural mechanisms apply equally to the Act's interconnection and resale provisions.

consistent with all applicable terms of the Act, and any binding FCC regulations. *See* 47 U.S.C. § 252(c)(1); § 252(e)(2)(B).

Once the arbitration is completed, the arbitrated terms are combined with the negotiated terms in a final agreement which is submitted to the state commission for approval. 47 U.S.C. § 252(e)(1). In reviewing the terms, the commission must determine whether each complies with the standards set out above -- that is, whether the arbitrated terms comply with the Act and the FCC's regulations, and whether the negotiated terms are non-discriminatory and consistent with the public interest. 47 U.S.C. § 252(e)(2)(A); § 252(e)(2)(B). The state commission's final determination is subject to review in federal district court, which is charged with making the same inquiry. *See* 47 U.S.C. § 252(e)(6).

B. Negotiation, Arbitration, and Review of the U S West/MFS Interconnection Agreement

The provision U S West now seeks to have invalidated is a *negotiated* provision, which states:

> USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS. However, USWC need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

Resp. App. 2a-3a (Joint Proposed Statement, at 73 (Arb. Record, Tab 40)). Because it was a negotiated provision, U S West did not present this provision to the WUTC for compulsory arbitration, and the arbitrator did not consider the

issue. In its January 8, 1997 order approving the final agreement, the WUTC approved this and other negotiated portions of the parties' interconnection agreement pursuant to § 252(e)(2)(A) of the Act, concluding that "[t]he negotiated provisions of the [agreement] do not discriminate against a telecommunications carrier not a party to the agreement and are consistent with the public interest, convenience, and necessity." *See* Pet. App. 37a.[6] No party challenged that finding.

U S West filed suit in federal district court pursuant to § 252(e)(6), challenging the WUTC's arbitration decisions on several grounds. Unsurprisingly, the complaint did not challenge the combinations provision to which U S West had voluntarily agreed. While that suit was pending, however, the Eighth Circuit vacated Rules 315(b)-(f); in response, U S West attempted to inject into the case a claim attacking the combinations provision. U S West conceded that it had agreed to the term, but also made the strained argument that it had only agreed to the combinations clause because it had submitted a provision to the WUTC for arbitration that would have prevented new entrants from purchasing enough elements in combination to provide a finished service.[7] Had U S West

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[6]The WUTC's order actually states that "[t]he negotiated provisions of the Act . . . are consistent with the public interest, convenience, and necessity." *See* Pet. App. 37a. It is clear from the context of the order, however, that this is a typographical error, and that the WUTC meant "Agreement."

[7]The arbitrated provision to which U S West referred stated in its entirety:

> This Agreement provides for the provision of Unbundled Loops to MFS which may be connected with MFS's switch for the purpose of offering a finished retail service. In addition, USWC agrees to provide an Unbundled Switching Element to MFS pursuant to the NIUER Process which may be combined with MFS-provided loops to

expected to lose the arbitrated issue, it argued, it would not have voluntarily agreed to the combinations provision. U S West offered no support for its novel theory that a strategic miscalculation converts a negotiated term into an arbitrated one.[8]

On review of the WUTC's decision approving the interconnection agreement, the district court denied all of U S West's claims, including its newly-minted challenge to the combinations provision. Pet. App. 28a. The Ninth Circuit affirmed, rejecting U S West's argument that the Eighth Circuit's holding required striking the combinations provision. Pet. App. 13a - 14a.[9] In so ruling, the Ninth Circuit noted that

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> provide a finished retail service. USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS. USWC agrees, however, to offer finished retail services to MFS for resale pursuant to Section XXX, Resale, of this Agreement.

Resp. App. 2a.

[8]The provision that U S West did submit for arbitration stated, among other things, that: "USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS." Resp. App. 2a. U S West argued that this provision was necessary to prevent MFS from providing a finished service using combined leased network elements. But this Court has squarely rejected that argument. *AT&T*, 525 U.S. at 393-94. In any event, at no time during the arbitration process did U S West condition its voluntary agreement to combine network elements on the WUTC's approval of the language in the arbitrated provision. Indeed, the record makes clear that it was only after the Eighth Circuit invalidated the FCC's rules that U S West concluded the two provisions were linked.

[9]Before the Ninth Circuit, MFS expressly defended the combinations provision on the ground that it was negotiated, noting that U S West's attempt to bootstrap its challenge to the combinations provision into its "finished services" argument "is a red herring, meant to distract the Court

this Court had rejected the grounds upon which the Eighth Circuit invalidated the FCC's combinations rules – namely, that § 251(c)(3) mandates that network elements be leased only on a separate basis. Pet. App. 12a-13a. Accordingly, the court of appeals upheld the parties' negotiated provision. Pet. App. 13a-14a.

REASONS FOR DENYING THE WRIT

I. BECAUSE THE CHALLENGED PROVISION WAS NEGOTIATED, THE HOBBS ACT IS NOT IMPLICATED.

U S West's petition necessarily depends on the premise that the combinations provision which it challenges was an arbitrated provision. That is because only arbitrated provisions must meet the requirements of § 251(c) of the Act and of the FCC's implementing regulations. Negotiated provisions, in contrast, must be consistent only with narrow, delineated statutory requirements, and need not be consistent with the FCC's regulations. Thus, if the combinations provision is negotiated, the FCC's regulations are irrelevant, as is the fact that those regulations are currently under review at the Eighth Circuit. Rather than raising any issue regarding the Hobbs Act, this case would instead require this Court first to determine whether, as a factual matter, the combinations provision was negotiated. If it was negotiated, then the decision below would have to be affirmed because a negotiated provision approved by a state commission pursuant to § 252(e)(2)(A) of the Act is

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from USWC's voluntary agreement to a negotiated provision that it now wishes it had not negotiated." Resp. App. 7a (MFS Opp. Br. at 37); *see also* Resp. App. 5a (MFS Opp. Br. at 35) (arguing that "nothing prevents an [incumbent] from voluntarily agreeing to combine elements for a requesting carrier").

enforceable without reference to § 251(c)(3) or Rules 315(c)-(f). *See* 47 U.S.C. § 252(e)(2)(A). No party has contended that the WUTC's approval of the agreement's negotiated provisions pursuant to § 252(e)(2)(A) was improper.

Presumably for this reason, U S West's petition attempts to suggest that the combinations provision was arbitrated, asserting, for example, that the court below "was reviewing a WUTC *requirement* that was itself just an implementation of the FCC rules under consideration in the Eighth Circuit." Pet. at 10 (emphasis added); *see also* Pet. at 2, 7 (asserting that the provision was "imposed" by the state PUC). But that assertion is contrary to the record, which demonstrates that the WUTC *did not* "order" or "require" that the combinations provision be included in the interconnection agreement. Instead, U S West *agreed* to the provision during voluntary negotiations. *See* Resp. App. 2a. Indeed, U S West conceded as much in its briefing before the Ninth Circuit. There, U S West made clear that it "was willing at the time of the arbitration to combine some elements for MFS, if paid for this service." Resp. App. 10a (U S West Reply Brief at 9). This concession is dispositive; it is also unsurprising, given that the provision at issue states, clearly and unambiguously, that "U S West *agrees* to perform . . . the functions necessary to combine requested elements . . . ." Resp. App. 2a (emphasis added).

Because U S West agreed to the combinations provision, the WUTC did not even consider the question of whether the provision was consistent with § 251(c)(3) of the Act. Thus, U S West's statement that the WUTC "simply adher[ed]" to Rules 315(c)-(f) is untrue.[10] Indeed, the WUTC never even

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[10]Indeed, the Arbitrator's Report and Decision, which was adopted by the WUTC in its entirety, never mentioned Rules 315(c)-(f). *See* Pet. App. 55a-57a. The only FCC combinations rule to which the arbitrator referred

considered Rules 351(c)-(f); instead it approved this negotiated term under § 252(e)(2)(A), which establishes the standard for reviewing negotiated agreements, and held only that all negotiated terms (including this one), were non-discriminatory and consistent with the public interest. Pet. App. 37a.

To be sure, after the WUTC's decision was appealed, U S West attempted to avoid the import of its agreement by arguing that it was not a true agreement: it was "willing" to perform combinations, U S West asserted, only because it had hoped that the arbitrator would rule in its favor on another provision and prohibit MFS from using combined elements to "obtain[] finished services at cost-based rates rather than resale prices." Resp. App. 10a (U S West Reply Brief at 9). But U S West's miscalculation hardly turns the voluntarily negotiated combinations provision into an arbitrated one.[11]

In short, U S West has twice tried and twice failed to convince a court to allow it to avoid the obligation it voluntarily assumed. Having failed in that effort, U S West now attempts

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in rendering his decision on U S West's "finished service" argument was Rule 315(a), which merely restates the requirement of § 251(c)(3) that: "[a]n incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service." 47 C.F.R. § 51.315(a).

[11]The court of appeals appeared to find that the provision would be lawful even if it had been arbitrated, concluding that "requiring U S West to combine unbundled network elements is not inconsistent with the Act . . . because the Act does not say or imply that network elements may only be leased in discrete parts." Pet. App. 13a. Presumably because it concluded that the provision met even this higher standard, the court did not discuss whether or not the combinations provision was negotiated. If this Court were to accept review, however, it would first have to determine whether the provision was negotiated and, if so, affirm on that basis.

to evade its agreement by transforming this case into a full blown dispute about the applicability of the Hobbs Act. Because this case involves a negotiated provision, however, it does not present that issue, and U S West's attempt to bootstrap it into this case fails.

II. BECAUSE THE NINTH CIRCUIT AND THE FOURTH CIRCUIT CONSISTENTLY APPLIED THE HOBBS ACT, THERE IS NO CIRCUIT SPLIT ON THIS ISSUE.

U S West's claim that a split exists between the Ninth and the Fourth Circuits (Pet. at 14-15) is baseless. Indeed, in the very case that U S West asserts creates a split, the Fourth Circuit *relied* on the very case under review here. That case, *GTE South, Inc. v. Morrison* involved a state utility commission's application of the FCC's pricing rules to disputed issues submitted by the parties for arbitration. 199 F.3d at 738-39. A challenge to the rules was pending before the Eighth Circuit on remand from the Supreme Court. Accordingly, at the time the Fourth Circuit reviewed the agreement, the FCC's pricing rules were in effect and binding. The Fourth Circuit correctly rejected GTE's argument that the court should independently review and invalidate those rules, holding that "a party cannot use an appeal from a district court to circumvent the Hobbs Act's requirement that a challenge to an FCC order is subject only to direct review in a court of appeals." *Id.* at 743.

In so holding, the Fourth Circuit cited the Ninth Circuit's decision in this case in support of its ruling that the Hobbs Act precludes a collateral attack on the FCC's order. *See id.* (citing *U S West v. MFS Intelenet*, 193 F.3d 1112, 1120, 1122-23 (9th Cir. 1999)). Specifically, the Fourth Circuit relied on the Ninth Circuit's decision refusing to independently evaluate FCC rules

in effect when it issued its decision. Although U S West had urged the Ninth Circuit to hold that the FCC's rules were inconsistent with the Act, the Ninth Circuit, relying on the Hobbs Act, expressly refused to do so, holding that "[t]he FCC order is not subject to collateral attack in this proceeding." Pet. App. 11a.

Nothing in the Fourth Circuit's decision conflicts with the Ninth Circuit's ruling. In those instances in which binding FCC rules were in effect at the time of its decision, the Ninth Circuit applied those rules despite *U S West's* argument that the Ninth Circuit should engage in *de novo* review of the FCC's regulations. *See* Pet. App. 11a, 16a-18a.[12] In those instances in which no FCC rule governed the question, the Ninth Circuit looked to the terms of the Act. The Ninth Circuit and the Fourth Circuit thus applied the Hobbs Act in precisely the same manner.

III. U S WEST'S PETITION IS BASED ON A FLAWED UNDERSTANDING OF THE HOBBS ACT.

Even if the provision at issue here had been arbitrated, and any existing FCC rules were relevant, the Ninth Circuit's decision would not warrant review. To begin with, the procedural setting of this case is highly idiosyncratic. The question U S West seeks to have addressed is whether, in the unique circumstances where the Supreme Court has dispositively interpreted the language of a statute in its review

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[12]U S West's present arguments are therefore at odds with the position it took before the Ninth Circuit. *See* Pet. App. 17a n.13 ("U S West argues that the Hobbs Act does not apply because section 252(e)(6) of the Act grants jurisdiction to federal district courts to determine whether the interconnection agreements comply with the Act and the FCC regulations. Section 252(e)(6) does not, however, grant jurisdiction to federal district courts to review the validity of FCC regulations.").

of an agency regulation, and the Hobbs Act court on remand is in the process of considering the impact of the Supreme Court's decision on a related regulation, another court of appeals is precluded from considering the Supreme Court's interpretation in assessing the meaning of the statute in a case not involving the regulations. U S West has not identified any case in which this issue has arisen before, and there is no reason to think it will ever arise again. Thus, there is no reason for this Court to grant review.

More fundamentally, the Ninth Circuit's decision does not usurp the Eighth Circuit's Hobbs Act jurisdiction because the Ninth Circuit did not purport to reinstate subsections (c) through (f). Because the Eighth Circuit's prior invalidation of those provisions was based on an interpretation of § 251(c)(3) that this Court has now rejected, several parties have asked the Eighth Circuit to reinstate subsections (c) through (f). That issue has been fully briefed and submitted to the Eighth Circuit. Nothing in the Ninth Circuit's decision limits the Eighth Circuit's ability to make up its own mind on reconsideration. Pet. App. 13a-14a. Accordingly, the Ninth Circuit's decision does not disturb the Eighth Circuit's exclusive authority to "enjoin[], set[] aside, or suspend[]" the FCC's rules. *See* 28 U.S.C. § 2349(a).

Even if the Ninth Circuit's understanding of the meaning of the Act differs from that the Eighth Circuit may announce in the pending remand proceedings, the Hobbs Act is not implicated. The Hobbs Act gives the courts of appeals exclusive jurisdiction to review all final orders of the FCC. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). As the court in which the direct appeals of the FCC's Local Competition Order and related rules have been consolidated, *see* 28 U.S.C.

§ 2112(a)(3), the Eighth Circuit is charged with assessing the validity of the FCC's regulations and entering any order "enjoining, setting aside, or suspending, in whole or in part," the agency's rules. 28 U.S.C. § 2349(a). No court has ever construed this language to mean that, if a Hobbs Act court happens to engage in statutory construction in the process of "determin[ing] the validity of" a Commission order, it thereby gains exclusive power to construe the underlying statute.[13]

To be sure, the Hobbs Act precludes a collateral proceeding that seeks to enjoin, set aside, suspend, or adjudicate the validity of FCC rules outside the "appropriate procedure for obtaining judicial review of the agency's disposition," which is in "the Court of Appeals as provided by statute." *ITT World Communications*, 466 U.S. at 468; *see also A.H. Belo*, 87 F.3d at 400. But the Ninth Circuit was not engaged in a collateral attack here, because it was not reviewing an FCC regulation.

It is for this reason that the cases on which US West relies are utterly inapposite. *See* Pet. at 12-13 (citing cases). Each of

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[13]The structure and legislative history of the Hobbs Act provide further confirmation that the Eighth Circuit's exclusive jurisdiction extends only to assessing the FCC's Local Competition Order, not to construing the statute behind it. The Hobbs Act is not structured to set up a quasi-Supreme Court with exclusive control over a particular area of federal law. Instead, it is designed to conserve judicial resources by ensuring that only one appellate court reviews the administrative record supporting the agency's decision and to guarantee that an agency order is not subject to continuous attack after a chosen court has evaluated its validity. *See, e.g.*, Sen. Rep. No. 81-2618, at 4-5 (1950); H.R. Rep. 81-2122, at 3-4 (1950); S. Rep. No. 85-2129, at 2-5 (1958). In keeping with this purpose, the bulk of the Hobbs Act is devoted to the appropriate treatment of the administrative record, the agency, and its order; it makes no mention of the reviewing court's power with regard to the underlying statute itself. *See, e.g.*, 28 U.S.C. §§ 2344, 2346, 2347; *see also* S. Rep. No. 81-2618, at 4-5 (1950); H.R. Rep. 81-2122, at 3-4 (1950).

these cases involves an effort to enjoin, or collaterally attack an *existing* agency order, something which the Ninth Circuit itself has expressly recognized is forbidden by the Hobbs Act. *See* Pet. App. 17a; *ITT World Communications, Inc.*, 466 U.S. at 468; *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69 (1970); *A.H. Belo*, 87 F.3d at 399; *Air Transport Ass'n v. Public Utils. Comm'n*, 833 F.2d 200, 206 (9th Cir. 1987); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir. 1986); *Yellow Forwarding Co. v. Atlantic Container Line*, 668 F.2d 350, 354 (8th Cir. 1981). These cases thus have nothing to do with a situation like the one presented here, in which an agency order has already been invalidated and a court is called on to determine, in the absence of an agency regulation, whether a challenged provision is consistent with the relevant statute itself.

Here, the Eighth Circuit previously exercised its exclusive power and "suspend[ed] . . . in part, the order of the agency." 28 U.S.C. § 2349. As a result of that decision, no relevant FCC rules are in place. Unless and until the Eighth Circuit reinstates the suspended rules, courts have returned to the world that existed *before* the FCC promulgated the challenged provisions. Each circuit must independently determine whether contractual terms comply with the Act in the absence of a binding FCC order on the subject. Thus, while no other circuit can reinstate Rules 315(c)-(f), they can certainly decide – as the Ninth Circuit did here – whether a similar contractual provision is consistent with the Act itself.

In sum, U S West's challenge depends on a fundamental misunderstanding of the scope of the collateral attack doctrine. The Hobbs Act and the principles underlying it merely prevent the Ninth Circuit from reinstating or relying on Rules 315(c)-(f) after they have been invalidated by the Eighth Circuit on direct

review, or from interfering with the Eighth Circuit's ability to decide the rules' validity on remand. Because the Ninth Circuit did not do so, there was no Hobbs Act violation.

CONCLUSION

The petition for certiorari should be denied.

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